

IN THE UNITED STATES DISTRICT COURT FOR THE  
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,	)	No. CR-F-98-5022 OWW
	)	
	)	MEMORANDUM DECISION AND
	)	ORDER DENYING PETITIONER
Plaintiff/	)	WILSON THOMAS'S MOTION FOR
Respondent,	)	REDUCTION OF SENTENCE
	)	PURSUANT TO 18 U.S.C. §
vs.	)	3582(c) (2)
	)	
WILSON THOMAS,	)	
	)	
Defendant/	)	
Petitioner.	)	
	)	

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On November 16, 2009, Petitioner Wilson Thomas, proceeding *in pro per*, filed a second motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2).<sup>1</sup> Petitioner contends that he is entitled to a reduction in his sentence pursuant to Amendment 706 to the United States Sentencing Guidelines.

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<sup>1</sup>On March 24, 2008, Petitioner filed a motion for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) based on the United States Sentencing Commission's reduction in the base offense level for offenses involving crack cocaine. Petitioner withdrew this motion on August 21, 2008.

1 Petitioner pleaded guilty to conspiracy to distribute and to  
2 possess with the intent to distribute cocaine and cocaine base  
3 (Count One) and to carrying a firearm in relation to a drug  
4 trafficking offense (Count Seven). Petitioner was sentenced to a  
5 term of 120 months imprisonment on Count One and a mandatory  
6 consecutive sentence of 60 months imprisonment on Count Seven.

7 "As a general matter, courts may not alter a term of  
8 imprisonment once it has been imposed." *United States v. Hicks*,  
9 472 F.3d 1167, 1169 (9<sup>th</sup> Cir.2007). However, 18 U.S.C. §  
10 3582(c) (2) creates an exception to this rule by allowing  
11 modification of a term of imprisonment if: (1) the sentence is  
12 "based on a sentencing range that has been subsequently lowered  
13 by the Sentencing Commission" and (2) "such a reduction is  
14 consistent with applicable policy statements issued by the  
15 Sentencing Commission." The Sentencing Commission promulgated  
16 Amendment 706 to the Sentencing Guidelines in response to the  
17 100-to-1 disparity in sentencing between offenses involving  
18 powder cocaine and crack cocaine. See *Kimbrough v. United*  
19 *States*, 552 U.S. 85 (2007). Amendment 706, which became  
20 effective on November 1, 2007 and was made retroactive by  
21 Amendment 713, reduces this disparity by adjusting downward by  
22 two points the base offense levels assigned to various quantities  
23 of crack cocaine in the Drug Quantity Table in U.S.S.G. § 2D1.1.  
24 According to the relevant U.S.S.G. policy statement, "a reduction  
25 ... is not authorized under 18 U.S.C. § 3582(c) (2) [if the]  
26 amendment ... is applicable to the defendant but the amendment

1 does not have the effect of lowering the defendant's applicable  
2 guideline range because of the operation of ... a statutory  
3 mandatory minimum term of imprisonment[]." U.S.S.G. § 1B1.10,  
4 cmt. n.1(A).

5 Petitioner was sentenced to the mandatory minimum sentence  
6 of ten years on Count One pursuant to 21 U.S.C. § 841(a)(1)(A).  
7 As ruled in *United States v. Paulk*, 569 F.3d 1094, 1095 (9<sup>th</sup>  
8 Cir.2009):

9 Paulk is not entitled to a reduction because  
10 his sentence was not 'based on a sentencing  
range that has subsequently been lowered by  
11 the Sentencing Commission,' 18 U.S.C. §  
3582(c)(2), but rather was based on the  
statutory mandatory minimum under 21 U.S.C. §  
12 841. This mandatory minimum 'was not  
affected by the change in the [drug]  
13 equivalency tables.'

14 Because Petitioner's sentence on Count One was not based on a  
15 sentencing range that was subsequently lowered by the Sentencing  
16 Commission, Petitioner is not entitled to reduction of his  
17 sentence pursuant to Section 3582(c)(2).

18 Petitioner's contention that the Court has discretion to  
19 reduce his sentence pursuant *Kimbrough*, *supra*, and *United States*  
20 *v. Knox*, 573 F.3d 441 (7<sup>th</sup> Cir.2009), is without merit.  
21 *Kimbrough* and *Knox* involved direct review of a criminal sentence  
22 that was not yet final, not a motion for reduction of sentence  
23 pursuant to Section 3582(c)(2) after a sentence had become final.  
24 See *United States v. Tabb*, 2009 WL 3352321 (S.D.Ill., Oct. 16,  
25 2009).

26 Petitioner asserts that, "[b]ecause § 846 is not included in

1 the § 994(h) mandate, § 994(h) does not limit a district court's  
2 discretion under Kimbrough to consider the crack/powder disparity  
3 affecting a career offender convicted under § 846, like the  
4 defendant."

5 28 U.S.C. § 994(h) mandates that the Sentencing Commission  
6 assure that certain "career" offenders, as defined in the  
7 statute, receive a sentence of imprisonment "at or near the  
8 maximum term authorized." U.S.S.G. § 4B1.1 implements this  
9 mandate.

10 Petitioner's contention is without merit. Petitioner was  
11 not sentenced as a "career offender" as that term is defined in  
12 Section 994(h)(1). Further, as ruled above, the Court does not  
13 have discretion to reduce Petitioner's sentence under Section  
14 3582(c)(2) because he was sentenced to the statutory mandatory  
15 minimum enhanced by a statutorily mandated consecutive 60 month  
16 term for use of the firearm.

17 For the reasons stated, Petitioner Wilson Thomas's motion  
18 for reduction of sentence pursuant to 18 U.S.C. § 3582(c)(2) is  
19 DENIED.

20 IT IS SO ORDERED.

21 Dated: December 3, 2009

22 /s/ Oliver W. Wanger  
UNITED STATES DISTRICT JUDGE

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